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IN THE

Supreme Court of the United States

October Term 1971

No. 71-8681

CARTRADE, INC., a corporation,

Petitioner,

vs.

FORD DEALERS ADVERTISING ASSOCIATION OF SOUTHERN CALIFORNIA, a corporation, and FORD MOTOR COMPANY, a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Cartrade, Inc. ("Cartrade") petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on August 13, 1971.

Opinions Below.

The opinion of the Court of Appeals is officially reported at 446 F.2d 289 (9th Cir. 1971); a copy is attached as Appendix "A", *infra*.

Jurisdiction.

The Judgment of the Court of Appeals was entered on August 13, 1971. By an order dated October 27, 1971, this Court extended the time for the filing of this Petition to January 4, 1972.

This Court has jurisdiction under 28 U.S.C. 1254-(1).

The jurisdiction of the trial court was based on 15 U.S.C. 15.

The jurisdiction of the Court of Appeals was based on 28 U.S.C. 1291.

Questions Presented.

1. Does the decision below, that an agreement among those who control 100 percent of the market which has the expected effect of excluding a competitor from that market is not *prima facie* invalid unless the excluded competitor also proves a specific intent to exclude, conflict with the decisions of the First Circuit in *Gamco v. Providence Fruit and Produce Building, Inc.* (1 Cir. 1952), 194 F.2d 484, and the Seventh Circuit in *Ricci v. Chicago Mercantile Exchange* (7 Cir. 1971), 447 F.2d 713, that latent monopolists must justify the exclusion of a competitor from a market which they control?

2. Is there a conflict between this Court's decision in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), which prohibits groups of businessmen from entering into an agreement to deprive a competitor of access to a service vital to its business unless such businessmen introduce evidence of justification of that agreement, with the decision below which sustains an agreement among groups of businessmen to deprive a competitor of access to a service vital to its business as *prima facie* lawful unless the aggrieved party introduces additional evidence of specific purpose to exclude.

3. Does the decision below that agreements among those who control 100 percent of a market which have

the expected effect of excluding a competitor from that market are not presumed to intend that exclusionary result, conflict with this Court's boycott decisions which hold that those who control a market and agree to exclusionary practices from that market are presumed to intend the natural consequences of their act?

4. May the Court of Appeals sustain a directed verdict on grounds not ruled upon by the District Court by ignoring testimony in the record without violating the Seventh Amendment to the Constitution of the United States?

Constitution and Statutes Involved.

Amendment VII to the Constitution of the United States reads as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in pertinent part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

Section 2 of the Sherman Act, 15 U.S.C. 2, provides in pertinent part as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdemeanor. . . ."

Section 4 of the Clayton Act, 15 U.S.C. 15, provides as follows:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statement of the Case.

The Facts and Proceedings Below.

Petitioner ("Cartrade") brought suit for damages, alleging that the Ford Dealers and Advertising Association of Southern California ("FDAA") and the Ford Motor Company ("Ford") had conspired with co-conspirators, Dealers Trade and Ford dealers and others to destroy Cartrade's business in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2). The case was tried before a jury. The issue of liability was tried first and after Cartrade rested, the trial court granted directed verdicts in favor of both defendants, and entered judgment in their favor.

The motions for directed verdict were based upon two grounds: (1) that no showing was made as to interstate commerce, and (2) even if such showing had been made, no violation of the antitrust laws was shown. The trial court granted a directed verdict solely on the first ground.

The facts established in the trial prior to the directed verdict are set forth with substantial accuracy

in the opinion of the Court of Appeals. The record showed that FDAA is a nonprofit corporation whose members are all of the franchised Ford dealers in Southern California, numbering 143 plus one dealer in Las Vegas Nevada. These dealers, therefore, controlled 100 percent of the market for the sale of Ford automobiles in Southern California.

FDAA acted as a trade association for the Ford dealers. Ford, of course, is a leading motor car manufacturer doing a nationwide business and selling its cars to those franchised dealers.

The record established that approximately 121,000 new Fords were sold in Southern California, with a value of almost $330,000,000 in 1965; that approximately 28,000 of these cars were assembled outside of California, with an estimated value of sales of over $81,000,000, and the remaining approximately 92,000 cars, at least partially assembled in California.

In 1965, Ford had no manufacturing plant in California, so that all the components finally assembled in California had themselves moved in interstate commerce, with an estimated dollar value in excess of $347,000,000.

Cartrade renders a point of sale to dealers who are selling cars to customers. Since Ford makes many types and models of cars and they come in a variety of body styles, colors, upholstery and trim, and carry a wide variety of accessories and extras, it is not feasible for any dealer to carry all of them in stock. If a particular customer wants a certain model with particular styling, equipment and accessories, and the dealer does not have the car in stock, he may lose the sale, either to another Ford dealer or to a competing dealer selling

another make. As the Court of Appeals noted, this is where the car trade comes in.

To find the car that the customer wants, the dealer might telephone all of the 143 other dealers to find the car and make a trade. Since this is, as a practical matter, chancy and time-consuming, he turns to a "car-trader" specializing in Ford cars. The cartrader has purchased from Ford the weekly inventory lists showing the location of every Ford car among the 144 Southern California Ford dealers and a description of its type, model, body style, color, upholstery, etc. After identifying the location of the desired car, the car-trader contacts the dealer with the desired automobile and initially negotiates a trade for the desired car [R.T. 178]. The formal arrangements for the trade are made by the two dealers. Sometimes, instead of a trade there is a purchase, but this seldom happens.

Cartrading is an alternative to a direct order from the customer through the dealer to the Ford plant. That alternative is a severe disadvantage because of the time lag in getting the car. If the customer is impatient, the dealer may lose the sale. Thus, the car-trading service is a valuable service to a dealer. As an example, in one year Cartrade arranged almost 17,000 trades, thus making it possible for dealer to immediately service 17,000 customers who might otherwise have gone elsewhere.

The owner of Cartrade, Mrs. Robinette, had been employed by Dealers Exchange, another Ford cartrader from 1951 to 1955. From 1955 to 1965, a period of ten years, both Dealers Exchange and Cartrade served as cartraders for Ford dealers in Southern California. During this period, Cartrade and Dealers Exchange

purchased dealers inventory lists from Ford. Each competed with the other in locating and negotiating for trades.

The business arrangement between a cartrader and a Ford dealer was direct. The Ford dealer paid an annual membership fee ranging from $100 to $150 annually and also paid a cartrading fee for each trade which was completed at his initiation. The fees ranged from $2.50 to $3.00 [R.T. 195, 196]. In January, 1965, Cartrade bought out Dealers Exchange.[1]

For almost one year, Cartrade had an exclusive contract with FDAA to supply cartrading services to FDAA members. Cartrade's complaint alleged that prior to the termination of the one-year agreement, Ford and FDAA conspired illegally to set up Dealers Trade, to supply the IBM inventory lists only to Dealers Trade, to secretly induce Cartrade's employees to go to work for Dealers Trade and thereby to intentionally put Cartrade out of the cartrading business and to permit Dealers Trade to monopolize the Southern California Ford cartrading business. As noted, the trial court directed a verdict against Cartrade upon the sole grounds that assuming a *prima facie* case of liability, no show-

[1]Although the Court of Appeals made no comment on this fact, petitioner's complaint (Par. 15) expressly alleged "that plaintiff was required (by FDAA) to buy out Dealers Exchange or to sell to Dealers Exchange in order to continue its business. Pursuant to this demand, plaintiff purchased the business and goodwill of Dealers Exchange in 1965 and agreed to pay and has paid a substantial sum therefor". Some evidence was introduced by plaintiff to support this allegation that it was an unwilling purchaser of the Dealers Exchange business and preferred the competition which had existed [R.T. 215]. When Cartrade offered additional evidence on this point, the evidence was excluded by the court upon the grounds that such evidence went to the issue of specific intent which, the trial court held, was irrelevant since, as it further held, the facts alleged by Cartrade showed a *per se* violation of the Sherman Act [R.T. 230-295].

ing had been made as to the existence of interstate commerce required by both Sections 1 and 2 of the Sherman Act. The Court of Appeals reversed this interstate commerce holding out of hand. The directed verdict was affirmed, however, on a grounds not relied upon by the trial court, namely, that no violation of the antitrust laws had been established, even *prima facie*.

The Court of Appeals noted that plaintiff's evidence would support a jury finding substantially supporting most of the critical elements of the complaint. Thus, the Court of Appeals stated:

> ". . . We assume that the evidence would support several factual findings:
>
> "(a) That Ford and FDAA agreed to terminate Cartrade's services to FDAA members and turn the business over to Dealers Trade;
>
> "(b) That both agreed that FDAA was going to do business but with one cartrader, Dealers Trade;
>
> "(c) That both knew that no cartrader could succeed without the IBM inventory lists; and
>
> "(d) That both intended that only Dealers Trade would get the lists."

The court had earlier noted that FDAA represented "all" of the Southern California Ford dealers. Thus FDAA represented in the cartrading business 100% of the market for new Ford automobiles in Southern California.

Judge Duniway held that Cartrade's case failed because the proof that these agreements between parties representing 100% of the Ford new car market and

Ford and the new Dealers Trade organization would eliminate plaintiff from competition in the cartrading business by withdrawing from plaintiff the supply of the critical services without which it could not compete, *i.e.*, the IBM lists, even with the knowledge that this would put Cartrade out of business, was still inadequate to prove a violation of Sections 1 or 2 of the Sherman Act without *further* proof "that these decisions were made for anti-competitive reasons or that the defendants dumped Dealers Exchange in favor of Cartrade or Cartrade in favor of Dealers Trade, for anti-competitive reasons. In the absence of proof, the presumption is that their reasons were lawful. . . ."

REASONS FOR GRANTING THE WRIT.

1. The decision below that an agreement among those who control 100% of the market which has the expected effect of excluding a competitor from that market is not *prima facie* a violation of Sections 1 or 2 of the Sherman Act unless the competitor also proves a specific intent to exclude, is in direct conflict with the decisions of the First Circuit in *Gamco v. Providence Fruit and Produce Building, Inc.* (1 Cir., 1952), 194 F.2d 484, and the Seventh Circuit in *Ricci v. Chicago Mercantile Exchange* (7th Cir., 1971), 447 F.2d 713, that latent monopolists must justify the exclusion of a competitor from a market which they control.

As noted, the decision below holds that an agreement which has the effect, indeed, the expected effect of excluding a competitor from the market is not *prima facie* invalid and does not require those who have excluded the competitor to come forward with evidence justifying the exclusion. In *Gamco v. Providence Fruit and Produce Building, Inc., supra*, defendant Provi-

dence Fruit and Produce Building, Inc. was the lessor of a building adjacent to the New Haven Railroad, designed to provide selling, storage and shipping facilities to the fresh fruit and vegetable dealers of Providence who had found themselves forced from the downtown city streets by accumulated traffic congestion. The building was a focal point for bulk consignment of fresh fruit and vegetables by local wholesalers and retail buyers habitually congregated in the building to purchase and supply fruits and vegetables. Local wholesalers were permitted to purchase corporate stock and rent individual units in the building from which they would sell to jobbers and retailers.

The plaintiff was a successor to an earlier wholesale concern which had been leasing space in the building. However, to finance purchases of merchandise, it had arranged credit from a Boston wholesaler and pledged its stock in the Providence Building as security, reserving the voting rights at the insistence of the building corporation. The directors of the Providence Fruit and Produce Building first granted a one-year lease to the plaintiff but thereafter refused to renew. Shortly thereafter, the plaintiff's stock in the Providence Building corporation was transferred to the Boston wholesaler by the Providence Building Corporation and the directors thereafter consistently refused to renew the lease. The suit was brought by the initial wholesaler, Gamco, against the building corporation, the directors, and other Rhode Island concerns which leased space in the building after Gamco was forced to quit the premises pursuant to a state court judgment.

The Court of Appeals held that on the facts shown, the control of the building, which for all intents and purposes was the sole location from which wholesalers

could sell their produce in Providence to jobbers and retailers, was the control of monopoly power. The trial court had held (1) that there was a possibility of duplicating the physical facilities of the building elsewhere along the New Haven line, and (2) that there was no clear proof of an articulated concert to exclude non-residents or foreigners as such. The Court of Appeals, although accepting each one of these findings of the trial court, reversed. It said:

> "But the latent monopolist must justify the exclusion of a competitor from a market which he controls. Where, as here, a business group understandably susceptible to the temptations of exploiting its natural advantage against competitors prohibits one previously acceptable from hawking his wares beside them any longer at the very moment of his affiliation with a potentially lower priced outsider, they may be called upon for a necessary explanation. The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize. Defendants thus had the duty to come forward and justify Gamco's ouster. This they failed to do save by a suggestion of financial unsoundness obviously hollow in view of the fact that the latter's affiliation with Sawyer & Co. put it in a far more secure credit position than it had enjoyed even during its legal tenancy. We therefore hold that, although selection and discrimination among those who would become lessees was necessary, defendants have failed to show that the basis for their action here was innocent of the economic consideration alleged" (194 F.2d 484, 488).

The court further stated:

> "It is incumbent on one with a monopolist's power to deny a substantial advantage such as this to a competitor to come forward with some business justification. Since none was offered, we must hold the exclusion unjustified" (194 F.2d 484, 489).

The Court of Appeals reversed the trial court and directed that the trial court ascertain and award damages, counsel fees and equitable relief.

The Seventh Circuit also adheres to the rule of law that the latent monopolist must justify the exclusion of a competitor from a market which he controls (*Ricci v. Chicago Mercantile Exchange* [7 Cir., 1971], 447 F. 2d 713).

The decision below is in direct conflict with *Gamco* and *Ricci*. It holds that those with monopoly power who, pursuant to agreement, exclude a competitor from the market, do not have the burden of showing justification for their agreement. Indeed, the burden is thrust upon the excluded competitor to prove lack of justification by a showing that an agreement by monopolists which had the effect of exclusion was also accompanied by an express purpose to exclude or other anti-competitive purpose.

This Court should resolve this patent conflict among the circuits. The resolution of the conflict is of great importance in the administration of the antitrust laws. If monopolists may, pursuant to agreement, exclude competitors and, in addition, impose the burden of proof of specific intent on those competitors, it is perfectly clear that the prohibitions against conspiracy to monopolize will become a dead letter. Evidence of ex-

press intent is excrutiatingly difficult to uncover. Shared monopoly power in major industries continues to be the rule rather than the exception. If such shared monopoly is accompanied by agreement and the agreement has the effect of exclusion, why should the excluded competitor have the additional burden of proving that such exclusion was deliberately intended?

It is respectfully submitted that the Ninth Circuit rule should be reversed and the *Gamco* rule established as the law of the land.

2. The decision below is in direct conflict with this Court's decision in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). In the *Silver* case, summary judgment was granted to the plaintiff, Silver, whose business telephone connections with certain members of the New York Stock Exchange were terminated by the New York Stock Exchange in agreement with those members. This Court held that such an agreement between the New York Stock Exchange and those members which deprived the plaintiff of a vital service necessary to his business constituted, in effect, a boycott which was illegal *per se* unless defendants could come forward with evidence to justify such an agreement. 373 U.S. 341. No justification having been offered, summary judgment was sustained.[2]

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[2]The *Silver* case was the principal decision relied upon by Cartrade in the trial court and in the court of appeals (App. Br., Ct. of Appeals, pp. 40-42). Judge Duniway made no reference to *Silver* in his opinion. Presumably, he was relying upon his analysis of the *Silver* case in Hawaiian Oke, *supra*. The statement that a boycott is illegal *per se* unless justification is shown appears to contain mutually exclusive rules but at least one lower court has held that Silver permits the defendants to offer certain types of evidence in justification. *Denver Rockets v. All Pro Management Inc.*, (1971 Trade Cases Par. 73.536).

The facts in the instant case are directly analogous to *Silver*. Here, 144 franchised Ford dealers, acting through their trade association, entered into an agreement with Ford (and, indeed, with a competitor of plaintiff) to cut off Cartrade's access to the critical tool of the cartrading business, *i.e.*, the Ford IBM inventory lists. The Court of Appeals expressly held that Cartrade's evidence not only supported that finding but further supported the finding that the parties to the agreement knew that the affect of their agreement would be to prevent Cartrade from staying in business. But Judge Duniway held, nevertheless, that plaintiff's evidence did not prove a *prima facie* violation of Section 1 or Section 2 of the Sherman Act. Cartrade was required in addition to prove an express purpose on the part of the respondents to exclude it from the cartrading business. *Silver* imposed no such requirement. Indeed, *Silver* made perfectly clear that those who deprive a competitor of access to a service vital to its business may have a limited right to show justification for their action, but the injured party meets his *prima facie* burden by showing the exclusionary agreement.

Indeed, the facts in the instant case are more flagrant than in the *Silver* case. In *Silver*, summary judgment was sustained despite the fact that no evidence was offered to show the reason why the New York Stock Exchange cut off his telephone line connections with its members and, indeed, the Exchange refused to give any reason. In the instant case, the Court of Appeals expressly acknowledged that there was a reason for the agreement to cut off Cartrade's access to the Ford IBM inventory lists, *i.e.*, to carry out a decision that only one cartrader should be permitted to provide

a cartrading service to 144 Ford dealers in Southern California.[3]

Judge Duniway states that authority for his ruling rests upon his earlier opinion in *Joseph E. Seagrams & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.* (9th Cir., 1969), 416 F.2d 71. In the *Hawaiian Oke* case, *supra,* Judge Duniway held, in a revolutionary decision, that two suppliers of a commodity could lawfully agree not to supply that commodity to a distributer if

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[3]It should be noted that other evidence of so-called specific intent was excluded by the trial court upon its belief that Cartrade's proof showed a *per se* violation of the Sherman Act without the necessity of a showing of any intent, whether "general" or "specific" and upon the alternative ground that the intended evidence offered against FDAA might prejudice Ford on the same issue. Thus, plaintiff sought to introduce evidence to show that Ford and FDAA compelled plaintiff to either buy Dealers Exchange or sell out to Dealers Exchange so that there would be only one cartrader. This evidence, offered on the express issue of intent, was initially refused by the court upon the grounds of irrelevance [R.T. 222] and later upon the grounds that the evidence was too prejudicial to Ford [R.T. 233]. An extensive colloquy was held by the court and counsel as to whether evidence of monopolistic intent would be permitted. This arose out of plaintiff's offer of Exhibit 4, the minutes of the meeting of FDAA dated December 1964, which showed that Ford representatives were present with FDAA representatives when the determination was made that there would be only one cartrader. The court held that it would have no compunction about instructing the jury that the circumstances of the Dealers Exchange—Cartrade agreement could be used to determine the intent of FDAA as they were the only defendant in the lawsuit [R.T. 274]. The intent involved was to put one out of business [R.T. 275-276]. When petitioner argued that the issue of the Dealers Exchange—Cartrade agreement was relevant on the conspiracy to monopolize [R.T. 281], the trial court ruled [R.T. 286] that the probative value of the testimony would not be outweighed by its prejudicial effect on the codefendants and that it really did not go to the issue of the plaintiff's case of a conspiracy which was alleged to have occurred in 1965 and early 1966. Pursuant to this ruling that specific intent was not an issue, the court sustained the objection to testimony concerning the FDAA-Dealers Exchange buyout [R.T. 295].

there was a valid economic interest on the part of each supplier to enter into such an agreement with each other. Judge Duniway in *Hawaiian Oke* made a comprehensive review of all of the decisions of this Court which appeared to indicate that commercial boycotts were illegal *per se*. He found that upon his close analysis, such boycott agreements were not really illegal *per se*, but were unlawful only when there was a showing that in connection with the boycott agreement or practice "there was a *purpose* either to exclude a person or group from the market or to accomplish some other anti-competitive objective, or both" (emphasis supplied) (416 F.2d 71, 76).

In *Hawaiian Oke*, Judge Duniway in this manner distinguished such cases as *U.S. v. General Motors Corporation*, 384 U.S. 127 (1966), *Fashion Originators Guild of America v. F.T.C.*, 312 U.S. 457 (1941), *Silver v. New York Stock Exchange, Inc.*, 373 U.S. 341 (1963), *Binderup v. Pathé Exchange, Inc.*, 263 U.S. 291 (1933), and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Since the facts in *Hawaiian Oke* only showed an agreement between two liquor manufacturers to stop selling their merchandise to the plaintiff and to sell their merchandise to a third party instead, such agreement under Judge Duniway's reasoning was not unlawful under either Section 1 or Section 2 of the Sherman Act since both manufacturers had allegedly good economic reasons to enter into this agreement with each other and there was no showing that otherwise their "purpose" was anti-competitive. Certiorari in the *Hawaiian Oke* case was denied although three members of this Court dissented, including Justices Black, Douglas and White (396 U.S. 1062)

Thus, the progression of *Silver v. New York Stock Exchange, supra,* through *Hawaiian Oke,* to the instant case seems to arrive at the following conclusions:

(a) *Silver* holds that agreements among businessmen to deprive a competitor of access to a service vital to its business is unlawful unless justified by defense evidence (373 U.S. 341).

(b) *Hawaiian Oke* holds that agreements among businessmen not to sell commodities to a distributor, other sources presumably being available, are, after trial, lawful if the plaintiff fails to show that there was some anti-competitive purpose other than the mere joint refusal to deal.

(c) The instant case holds that agreements among groups of businessmen, even those who control 100 percent of the market, to deprive a competitor of access to a service vital to its business, are lawful *per se* and that the injured party must prove in addition that the defendants had a purpose to exclude, and absent such proof, those who enter into such agreements need not even put on a defense.

In the Ninth Circuit, therefore, commercial boycotts are not illegal *per se*: they are legal *per se*.

It is respectfully submitted that this Court should not permit this deterioration in the rules prohibiting boycotts. If the Sherman Act is indeed a "charter of economic freedom," then the rules against boycott should be strengthened, not obliterated.

3. Respondents' express purpose to exclude Cartrade from competing in the cartrading business in Southern California was an issue for the jury to determine. The decision below which removed that ques-

tion from the province of the jury violated the Seventh Amendment to the Constitution of the United States. Judge Duniway expressly held that in agreeing with Ford, that Ford would no longer supply the IBM lists to Cartrade, FDAA and Ford both knew that no cartrader could operate without the IBM lists and therefore, it follows, that Cartrade must necessarily be put out of business by that agreement. If the Sherman Act prohibition against boycotts is to have any meaning, such evidence, standing alone should permit a jury to infer intent to exclude, at least in the absence of evidence produced by the boycotters showing that there was some other intent involved. The Trial Court held he would permit exactly such an inference [R.T. 274-276]:

It is apparent, however, that by its language which required Cartrade to prove intent to exclude, Judge Duniway meant to impose the requirement of the proof of a kind of maliciousness, *i.e.*, a deliberate attempt to destroy Cartrade's business. This must be true, since only this different meaning to the words "intent to exclude" explains the court's faliure to make any reference to the following evidence:

(a) Maurice Burgie, an officer of FDAA, solicited Cartrade's employees to leave Cartrade and accept employment with the new cartrading company which had in effect been created by Burgie. When one of these employees argued that Cartrade would continue to compete despite the arrival of a new cartrading company on the scene, this argument and the resistance of the employee were overcome by Burgie's statement that Cartrade would be unable to work without the IBM lists and that the IBM lists were tied up [R.T. 652-653; 659, 754]. In addition, the FDAA officer told the

Cartrade employee to keep the IBM discussion secret [R.T. 746].

(b) Finally, another FDAA officer told Cartrade's president to give her employees notice "because you won't be in business any longer" [R.T. 321].

This evidence, together with the remaining record, clearly made the issue of "intent to exclude" a jury question. By taking that question from the jury through an unarticulated and inexplicable use of the term "intent to exclude", the decision below violated Cartrade's right to a jury trial under the Seventh Amendment to the Constitution of the United States.

Conclusion.

Petitioner respectfully prays that this petition be granted.

Dated: January 3, 1972.

Respectfully submitted,

JACK CORINBLIT,
Attorney for Petitioner.

CORINBLIT & SHAPIRO,
Of Counsel.

APPENDIX.

Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Cartrade, Inc., a corporation, *Plaintiff-Appellant*, vs. Ford Dealers Advertising Association of Southern California, a corporation, and Ford Motor Company, a corporation, *Defendants-Appellees*. No. 24,447.

[August 13, 1971].

Appeal from the United States District Court, for the Central District of California.

Before: BARNES and DUNIWAY, Circuit Judges, and SOLOMON, District Judge*

DUNIWAY, Circuit Judge:

Cartrade, Inc. brought suit for damages, alleging that the Ford Dealers Advertising Association of Southern California (FDAA) and the Ford Motor Company (Ford) had conspired to destroy Cartrade's business, in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). The case was tried before a jury. The issue of liability was tried first, and after Cartrade rested the trial court granted directed verdicts in favor of both defendants, and entered judgment in their favor. Cartrade appeals; we affirm.

The motions for directed verdict were based upon two grounds, that no substantial effect on interstate commerce was shown, and that, if there were some such effect shown, still, as a matter of law, no violation of the anti-trust laws was shown. The trial court rested its decision solely on the first ground.

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*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

1. *The Facts.*

We state the facts most favorably to Cartrade. Here is what the record shows.

a. *The Parties.*

Ford is a motor car manufacturer, doing a nation-wide business, and selling its cars to franchised retail dealers. FDAA is a non-profit corporation, whose members are all of the franchised Ford dealers in Southern California, numbering 143, plus one dealer in Las Vegas Nevada. FDAA acts as a trade association whose primary function is to advertise and promote the sales of Ford products in its area. For each car bought from Ford by a member dealer Ford pays $20.00 to FDAA; this is the sole source of FDAA's funds. Appellant Cartrade is a California corporation owned by Mrs. Adele Robinett, and having an office in Hollywood, California. It is the successor to Cartrade Association, an unincorporated business formed in 1955 whose proprietor was Mrs. Robinett.

b. *The commerce involved.*

In 1965 there were 120,900 new cars sold by Ford to Ford dealers in the Southern California sales district; the estimated dollar value of the sales was $329,720,000. Of the 120,900 cars, 28,300 were completely assembled outside of California; the estimated dollar value of the sales of these 28,300 cars to the dealers was $81,240,000. The remaining 92,600 were at least partially assembled in California. However, in 1965 Ford had no manufacturing plant in California, so that all the components finally assembled in California had themselves moved in interstate commerce. The estimated dollar value of those components for 1965 was $347,100,000.

c. *Cartrade's place in the commerce involved.*

The term "Cartrade" is misleading. Cartrade has never bought or sold or traded cars. Rather, it renders a point-of-sale service to dealers who are selling cars to customers. Ford makes many types and models of cars. They come in a great variety of body styles, colors, upholstery, and trim, and they carry a bewildering variety of accessories and extras. Thus it is not feasible for any dealer to carry all of them in stock. If a particular customer wants a certain model with particular styling, equipment, and accessories and the dealer does not have the car in stock, he may lose the sale, either to another Ford dealer or to a competing dealer selling another make. That is where the cartrade comes in.

If the dealer wished to, he could telephone each of the other 140-odd dealers in the area to ask whether the dealer had the desired car. If he found such a dealer, he could then trade a car in his own stock for the desired car, and thus save the sale. As a practical matter, however, the dealer cannot afford that sort of chancy and time-consuming effort. So he turns to a "cartrader" specializing in Ford cars. He tells the cartrader what specific car he wants. The cartrader maintains up-to day inventory lists of its client dealers' stock of cars and checks the lists to see whether any dealer has the desired car in inventory. If one of them has, the cartrader notifies the inquiring dealer, who then calls the other dealer and offers to trade. Sometimes a dealer called by a cartrader will want a particular model Ford in exchange; in that case, the cartrader can tell him whether the inquiring dealer has such a car, and, if he does not, what other cars he does have that might interest the called dealer. On oc-

casion, the inquiring dealer will not want to part with any of the cars in his stock that the called dealer requests in return. In such a case, the inquiring dealer may simply buy the car he wants from the called dealer. However, this seldom happens.

As an alternative to using a cartrader, the dealer could order the desired car directly from Ford. The disadvantage of ordering from the factory is the time-lag involved in getting the car; if the customer is impatient, the dealer may lose the sale. The value of an available cartrading service to a dealer is evident.

From 1951 through 1955, Mrs. Robinett had been employed by Dealers Exchange, another cartrader. From 1955 to 1965, both Dealers Exchange and Cartrade served as cartraders for Ford dealers in Southern California. On January 14, 1965, Cartrade bought out Dealers Exchange, and on January 26, Cartrade contracted with FDAA to become the exclusive cartrading agency for all Ford dealers belonging to FDAA.

During the period from 1960 to January 1965, both Cartrade and Dealers Exchange received dealer inventory lists from Ford's district sales office for Southern California. During the period from February 1, 1965, to February 28, 1966, Cartrade was the exclusive cartrading agency for FDAA, and it alone received the inventory lists. Cartrade paid Ford approximately $125 per month for the lists. The lists were compiled in the following manner: When a Ford car was released by the factory to the carrier for shipment to the dealer, an IBM card containing a complete description of the car was sent to the dealer. A duplicate card went to Ford's district sales office. Using the IBM cards, the district sales office prepared computer print-out current inven-

tory lists for all the Ford dealers in the Southern California district.

Before Ford's adoption of this computerized inventory procedure, Cartrade had obtained inventory information directly from the many Ford dealers, by telephone. The information was entered by hand on large sheets of paper, in tabular form. The parties agree that, with the proliferation of Ford models, styles, and accessories since 1960, it is no longer practicable for a cartrader to compile its own lists by hand. If one Ford cartrader does not receive the IBM inventory lists it will not be competitive with another Ford cartrader that does receive them.

d. *The conduct complained of.*

Cartrade's contract with FDAA provided:

> "1. . . . That [FDAA] shall pay annual membership fees [to Cartrade] amounting to $180.00 for each of its members for the year commencing February 1, 1965, to and including January 31, 1966. . . .
>
> 2. That the initial term of this agreement shall be February 1, 1965, to and including January 31, 1966, and thereafter [FDAA] shall have the option of renewing the same each year for an additional term of one year, commencing on the first day of February in each year. . . . Provided, further, that either party hereto may terminate this agreement at any time on six months' notice in writing to the other. . . . The fee during any such succeeding year shall be $180.00 per member of [FDAA]. . . . That each dealer member shall pay [Cartrade] directly, $3.00 for each individual transaction wherein a motor vehicle is sought and acquired by such dealer member through the information facilities of [Cartrade]."

In early January, 1966, Mrs. Robinett was notified by FDAA that the contract would not be renewed for an additional year, but that FDAA would like to continue its relationship with Cartrade on a month-to-month basis. The month-to-month arrangement commenced on February 1, 1966. In mid-February Mrs. Robinett was told that the arrangement would be terminated at month's end. It was, and Cartrade ceased doing business on March 1, 1966. Since then, FDAA has obtained its cartrading services exclusively from a new cartrading organization, called Dealers Trade. When Cartrade ceased business, two of its employees went to work for Dealers Trade.

In February 1966, Ford decided no longer to make its IBM lists available to Cartrade. Instead, it agreed to supply the lists only to FDAA, which in turn supplied them only to Dealers Trade, the new cartrading organization. At about the same time, the FDAA decided to terminate its month-to-month exclusive arrangement with Cartrade. These decisions effectively eliminated Cartrade as a viable cartrading agency.

Cartrade claims that Ford and FDAA conspired illegally to set up Dealers Trade, to supply the IBM inventory lists only to Dealers Trade, to induce Cartrade's employees to go to work for Dealers Trade, and thereby intentionally to put Cartrade out of the cartrading business to permit Dealers Trade to monopolize the Southern California Ford cartrading business.

2. *Interstate Commerce.*

There can be no doubt that Ford, in selling its cars to Southern California dealers, and FDAA's members, in buying those cars, are in interstate commerce. More-

over, we have no doubt that the resale of cars by FDAA members to their customers are an essential part of the flow of interstate commerce. To say the least, these resales directly affect interstate commerce. Without those resales, there would be no interstate commerce in Ford's cars or in components to be assembled into Ford's cars. The fact that the ownership of a car purchased by an FDAA member dealer passes to the dealer from Ford at the time the car is released by Ford to the carrier for delivery to the dealer does not affect the foregoing conclusion.

Cartrade's activities facilitated the resale of Ford cars by Ford dealers. It operated at the nexus between the interstate sales by Ford to the dealers and the intrastate resales by dealers to customers. We think that it would be quite unrealistic to say that Cartrade's activities did not affect interstate commerce. Indeed, it seems more realistic to us to say that Cartrade was "in" interstate commerce, although we need not go so far.

There is evidence that while Cartrade had its exclusive arrangement with FDAA it effected about 1400 trades per month or 16,800 trades per year—a by no means minuscule business. At $2,900 per car, this would amount to over $40,000,000 worth of cars involved in trades. The annual fees from FDAA members, plus $3.00 per trade, would bring Cartrade a gross income in excess of $76,000.

It is no answer to say that there is no evidence that the vehicle-locating services provided by Cartrade ever involved a trade, or an attempted trade, or even an inquiry concerning a possible trade, between Ford dealers in different states. It is not necessary that the business be "in" interstate commerce; it is enough that it substantially "affect" interstate commerce.

3. *Violation of the anti-trust laws.*

The question remains, however, granted that Cartrade's business affected interstate commerce, whether what happened to Cartrade violated the anti-trust laws. Many things happen, either "in" or "affecting" such commerce that do not violate the anti-trust laws.

We hold that Cartrade has failed to show a violation of the anti-trust laws. In so holding, we assume that the evidence would support several factual findings: (a) that Ford and FDAA agreed to terminate Cartrade's services to FDAA members and turn the business over to Dealers Trade, (b) that both agreed that FDAA was going to do business with but one cartrader, Dealers Trade; (c) that both knew that no cartrader could succeed without the IBM inventory lists, and (d) that both intended that only Dealers Trade would get the lists.

Our reasons are two. First, there is no evidence that the substitution of Dealers Trade for Cartrade had any effect upon interstate commerce in Ford cars. Second, there is no evidence that the defendants, in bringing about the substitution, had, as a primary purpose, putting Cartrade out of business or compelling it to conform to any anticompetitive practices.

First, there was no effect upon commerce in Ford cars. Cartrading among Ford dealers in Southern California is not a means of promoting competition between those dealers. As between them, it is a mutual backscratching operation designed to minimize the chance that any of them will lose a sale. Its value is to promote good will for each dealer, by enabling him to meet his customer's wants, and for Ford cars by assuring prompt delivery of the specific car desired. Its

competitive effect is to avoid loss of customers to other dealers selling other cars that compete with Ford's. As Evans, a Ford representative testified:

> "The ability to supply a car at a given moment when a customer wants it will increase our total sales. For example: if a customer comes to a dealer's place of business and asks for a car with a particular style and color and it is unavailable, it is entirely possible that that customer will go elsewhere and perhaps go to competition to purchase a car. So if we can provide the car at the given instant, we will save the sale."

As to this type of competition, there is not a shred of evidence that the switch from Cartrade plus Dealers Exchange (2 Ford cartraders) to Cartrade as the only Ford cartrader, in January, 1965, or from Cartrade to Dealers Trade in March, 1966, had the slightest effect upon it. In relation to the 1965 switch, when Cartrade became the only Ford cartrader, all that counsel can point to is Mrs. Robinett's testimony. She said that in a conversation with Evans she told Evans that Lewis, the operator of Dealers Exchange, which she had purchased,

> "had misrepresented his contract to us. He had not been doing the amount of trades that we had been doing, and he had told us he was. We thought we had—the business was better in competition as far as we were concerned, you know, because we had been making 900 trades in competition and he said he had been making 900 trades. That would make 1800 trades per month [prior to the merger of Cartrade and Dealers Exchange], and we just weren't making 1800 trades per month [following the merger]. So he had misrepresented his contract. . . ."

Mrs. Robinett testified that she then said to Evans,

> "Wouldn't it be better to be in competition? That way you would be delivering more cars. If he [the new cartrader] was doing 900 trades and we were doing 900 trades, that would be 1800 trades per month, and it would be—now we are only making 1400 per month, so you are not delivering as many cars."

Mrs. Robinett testified that Evans then said,

> "Yes, maybe it would be [better to have competing cartraders] if that is the case."

Cartrade argues that Evans' response constituted an admission "that two car trading organizations and competition between them would be better for Ford." It did not. Mrs. Robinett quoted Evans as favoring competing cartraders "if that is the case"—*i.e.*, if the figures that Mrs. Robinett had given him were correct. Evans not admit that they were; Mrs. Robinett did not say that they were; her statement to Evans was that they were false. To predicate liability for treble damages in an anti-trust case upon such testimony is to make a mockery of the burden of proof, which rests on the plaintiff. There is no other evidence to which Cartrade points.

Even if the figures were accurate, they would show only that the number of *cartrades* decreased when there was one cartrader rather than two. That fact may mean any number of things. It may mean that Ford lost sales in Southern California to its competitors. It may mean that Ford's net sales remained constant, but that customers went to different Ford dealers to obtain their desired models when the dealers they first approached were unable to make the trades. Or it may

mean that Ford customers who wanted unavailable models accepted substitutes from the first Ford dealers they visited, or waited for the dealers to order the desired models from the factory. Nothing in the record even hints at which of these possible consequences ensued, let alone that any of them ensued *because of* the absence of a competing cartrader.

In relation to the 1966 switch, from Cartrade to Dealers Trade, counsel cites nothing in the record, and we can find nothing, about its effect upon competition in the sale of Ford cars. For all that appears, Dealers Trade may have arranged for twice the number of trades that Cartrade arranged.

In short, we find no evidence that the conduct complained of had any effect, much less a "not insubstantial effect" on commerce in Ford cars. *Northern Pacific Ry. v. United States*, 1958, 356 U.S. 1, 6; *Uniform Oil Co. v. Phillips*, 9 Cir., 1968, 400 F.2d 267, 269.

The only other conceivable basis for liability is the effect of what the defendants did upon the business of "cartrading" in Ford cars. As to that, obviously Cartrade was hurt; it lost the business and Dealers Trade got it. But in this setting that is not a basis for finding liability. Cartrade does not argue that it is illegal for FDAA to deal with cartraders in behalf of its members. It posits liability on the notion that it is wrong for FDAA to decide to deal only with one cartrader, and that the one will not be Cartrade. That, however, is not enough. There is here no evidence whatever that these decisions were made for anti-competitive reasons, or that the defendants dumped Dealers Exchange in favor of Cartrade, or Cartrade in favor of Dealers Trade, for anti-competitive reasons. In the absence of proof, the

presumption is that their reasons were lawful; that they believed Cartrade alone would do a better job of helping the dealers to compete with sellers of other makes than the combination of Cartrade and Dealers Exchange, and that Dealers Trade would do a better job than Cartrade was doing. We can see how a single cartrader having in its possession the inventory of every Ford dealer might do—or in good faith be believed by the dealers to be likely to do—a better job for the dealers, with less expense to them and less waste of their time than competing cartraders would be able to do. And we can think of innumerable reasons why FDAA and its members, and Ford as well, may have become dissatisfied with the services of Cartrade. To find liability here would be to saddle the dealers with Cartrade's services forever. The principles we applied in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors*, Ltd., 9 Cir. 1969, 416 F.2d 71, 74-80, are applicable here.

Burke v. Ford, 1967, 389 U.S. 320, is not here in point. It involved a statewide agreement between all liquor wholesalers to divide markets both by territories and by brands. The anti-competitive effect of such a *per se* violation is too obvious to require proof; so is its effect on the movement of liquor in interstate commerce. Not so here.

Affirmed.